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Nos. 87-1022, 87-1112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BOARD OF ESTIMATE, THE CITY OF NEW YORK, EDWARD I. KOCH, Individually and as Mayor of the City of New York, et al.,

Appellants,

—v.—

BEVERLY MORRIS, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR ABRAHAM D. BEAME and PERCY E. SUTTON, AMICI CURIAE, IN SUPPORT OF MUNICIPAL APPELLANTS

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Statement of Interest

Amici Abraham D. Beame and Percy E. Sutton have devoted much of their lives to promoting the effective governance of our Nation's largest metropolis. Mr. Beame has served at the highest levels of government in the City of New York: as Mayor (1974-1977), Comptroller (1962-1965, 1970-1973) and Budget

* Appellants and Appellees have consented to the filing of this brief. Their letters of consent are filed with the Clerk of the Court.

Director (1952-1961). For twelve years he served as one of the three Citywide officials on the Board of Estimate. While active in numerous political and community groups in the City, Mr. Beame is currently a financial consultant to a major bank in New York City.

Mr. Sutton's history is equally impressive: He served as Manhattan Borough President for over a decade (1967-1978) and, as such, as a member of the Board of Estimate; he also served as a New York State Assemblyman (1964-1967). He has held leadership positions in numerous public service, community and business organizations in the City and is currently Chairman of the Inner City Broadcasting Corp., which owns numerous New York City-based communications companies, as well as the world renowned Apollo Theater in New York City's Harlem.

As former members of the Board of Estimate—and as longtime government, community and business leaders in the City of New York—few individuals better understand the nature and importance of the Board of Estimate than amici; few better understand why this eighty-seven year old institution is vital to the delicate balance of regional and local interests essential to the effective democratic governance of New York City. As former government officials—and as businessmen with investments tied to the confidence and stability of New York City's local government—amici have deep professional, financial and personal interests in the efficient operation of New York City's local government. As supporters of the Board of Estimate, they have an interest in ensuring that this pioneer of democratic regional government is not destroyed in the name of democracy.

Amici submit this brief to clarify what should be the central focus of this case: the overriding governmental interests served by the Board of Estimate for almost a century which, together

with its at-large majority composition, validate its constitutionality whatever method of measurement is selected to analyze its structure. The validity of the Board of Estimate turns not on how the arithmetic underlying the Board's structure is manipulated, but rather on the legitimate government purposes the Board serves. We address this brief solely to that issue.[1]

Argument

THE BOARD OF ESTIMATE EMBODIES A RATIONAL PLAN FOR REGIONAL GOVERNMENT THAT PROMOTES LEGITIMATE PUBLIC POLICIES AND JUSTIFIES POPULATION DEVIATIONS NECESSARY TO ACCOMPLISH ITS PURPOSES

In the Courts below, this case proceeded on the assumption that the central issue was one of arithmetic. If a method of measurement produced a deviation of 133%, the Board was bad. If it produced a deviation of 16%, the Board was good. If a method of measurement could be found to reduce Appellees' 133% deviation to the Municipal Appellants' 31%, then perhaps the Courts would find the numbers palatable and give their blessing. So heavily did the case focus on numbers that the Second Circuit opinion dealt almost exclusively with the arithmetic issues.

While we agree with Appellants that the 133% deviation found by the Courts below is grossly exaggerated because of their disregard of the at-large members, we believe that the heart of the Appellants' case is neither arithmetic nor the validity or invalidity of the Banzhaf formula. The heart of the case is found in the underlying governmental policies animating the Board and in its ingenious structure which precludes minority control, balances regional and local perspectives and does not, in the real world, favor any group of New Yorkers over others. In our federal system, these state policies and institutions are entitled to "substantial deference" from the federal govern-

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1 Amici incorporate the statement of the case as set forth in the Brief for the Municipal Appellants.

ment. *See, e.g., Brown v. Thomson*, 462 U.S. 835, 847-48 (1983). Because of these policies, the Board's electoral design, we submit, satisfies the equal protection clause. The arithmetic issues are secondary at best.

We turn to an examination of these state policies.

1. *Promoting Regionalism*: The New York Constitution says that "[e]ffective local self-government and intergovernmental cooperation are purposes of the people of the state." N.Y.S. Const. art. IX, § 1. New York State has an especially strong interest in its policy of exercising certain of its most localized police powers through a regional governing entity comprised of elected officials. (JA394, 443-444.)[2] In determining the Board's makeup, the State was entitled to take account of the political exigencies of forming and operating such a regional government for New York City.

Ordering priorities and policies between the competing—and equally legitimate—claims of local and regional interests in land and government resources is the central problem in the management of this country's largest metropolitan area. (JA409-425.) "Throughout the city's history," as appellees' expert notes, "the Board of Estimate has been the principal body where this conflict, and, most significantly, the resolution of this conflict, has been deliberately institutionalized." (JA73.) After nearly a century, "[t]he conflict between City-wide and local priorities, which necessitated the creation of the Board of Estimate, still exists." (*Id.*)

The need for regional institutions of this type is manifest: The efficient deployment of resources and the orderly development of land compel cooperative ventures in service of the general welfare.[3] The interdependence of activities within a metropolitan area require area-wide institutions to perform certain government functions. (*See, e.g.*, JA447-449.) Yet a basic political reality confronts a state in shaping such substate units to address regional needs: No tradition is more firmly implanted on our body politic than that of home rule (N.Y. Municipal Home Rule Law art. 2, § 10(13) (McKinney Supp. 1988; *see also* JA443); de Tocqueville long ago wrote that "in the United States municipal liberty derives straight from the dogma of the sovereignty of the people" A. de Tocqueville, *Democracy in America* 67 (G. Lawrences trans. 1969). People want some control over their own affairs; they demand a say on matters closest to home; they insist on the right to participate in decisions that will affect their community. (JA411, 435, 449, 456.) And nothing so sharply engages this interest as decisions on the use of land and government property.

The tension between the need for regional governing entities and traditions of local independence etches in sharp relief the policies the Board of Estimate embodies. (JA73.) The policy of New York State—and of every state—is to delegate police powers over land, government property, and contracts for basic government services to the smallest political subdivisions within the State. This policy expresses a decision that people should have a meaningful voice, through elected officials at the most local level, in decisions that most directly affect their communi-

2 "JA___" refers to pages in the Joint Appendix to the Municipal Appellants' Brief. "JS___" refers to pages in the appendix to the Municipal Appellants' Jurisdictional Statement.

3 Some of these may extend to more than one state. A well-known example is the Port Authority of New York and New Jersey, which is a bi-state agency of the States of New York and New Jersey. It exercises dominion over a vast enterprise with a vast budget and exercises wide governmental powers. It is governed by a Board composed of an equal number of representatives appointed by each of the states. If New York and New Jersey were to decide that the Port Authority should be governed by a Board composed of the three highest elected officials in each State—the governor, the comptroller and the attorney general—then if the Second Circuit correctly reads the Equal Protection Clause, such an arrangement would be invalid because New York's representatives would not have 2.3 times the votes of the New Jersey representatives. To accommodate such a requirement would make an effort to democratize the Port Authority absurd—and would most likely destroy it altogether.

ties. The peculiar needs of New York City—the need to bring a controlling City-wide perspective to competing local demands—required some accommodation of that policy to address regional problems. (JA592.) The State reasonably concluded that providing an equal vote to borough presidents was essential to obtain a consensus on the transfer of local powers to a central authority, and to allow that body in turn to achieve consensus on the proper ordering of City-wide priorities.

The State was entitled reasonably so to conclude. It is not beyond the legitimate considerations of a state, in seeking to formulate regional responses to social problems, to take account of the reluctance of small communities to tolerate the unchecked exercise of local powers by a central authority. It is not outside the broad realm of permissible State decisionmaking to provide some institutional assurance that smaller components of a regional federation will not become the sites for the most noisome of regional activities such as garbage disposal plants and prisons. It is not beyond reason for the State to conclude that equal votes for borough presidents will tend to create a cohesive local bloc to defend local interests against a centralist viewpoint. It is not irrational for a State to determine that the benefits of pooling resources—of bringing together Manhattan's huge tax base, Staten Island's large tracts of undeveloped land, the manufacturing and port facilities of Brooklyn, the bedroom communities of Queens and the Bronx—required some political adjustments to induce the people of each community to join and work in harmony. (*See, e.g.*, JA435, 449, 456.) It is within the power of a State to determine that a combination of majority rule with an equal vote for existing local officials representing the borough is an acceptable accommodation to achieve the support necessary for the formation and successful operation of a regional body. Reasoned compromise, such as that between regionalism and localism reflected in the Board's structure, has its place in the Constitution.[4]

4 *See* Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 351 (1977) (Judge Leventhal opposed "rigidity" in approaches to regional governments which would discourage "[w]ealthier suburbs" from joining "the needy and densely populated cities in metropolitan councils"); Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. Penn. L. Rev. 261, 305 (1987) ("[M]unicipal government pursuing locally chosen policies within a state-determined framework needs greater flexibility to prevent the local preferences of other municipalities from narrowing its own range of choices").

The contrary result below threatens more than the dismantling of New York City's oldest government institution. The need of the future is for more, not less, regional government; for more, not less, cooperation among villages, towns, cities, counties, and states; for more, not less, recognition of the interdependence of disparate political communities in the use of local land and resources—precisely the matters over which the Board exerts jurisdiction. The enormity of political opposition to regionalism, stemming from understandable fears that a remote central authority will ignore local interests, compels compromise for this need to be met. (JA435, 449, 456.) An overly rigid application of the one-person, one-vote principle, blind to the realities of how such regional bodies come into being and how they operate, can only frustrate State efforts to balance centralization with local autonomy, majority authority with minority representation, and relative efficiency with participatory and responsive government. Nothing in the Constitution compels that result.

2. *Assuring Meaningful Representation*: Appellees conceded below that assuring "[m]eaningful participation by the citizens of the lesser populated boroughs" is a valid state interest. (JA394.) In designing the Board's electoral design, the State properly considered the need to assure meaningful representation of all segments of the population.

The record here is overwhelming—no contrary evidence exists—that recomposing the Board according to strict population would reduce the citizens of Staten Island (and, of necessity, the Bronx as well) to the status of bystanders in the Board's deliberations. (JA404-499.) Not only did appellees' own expert so opine (JA167), but so, too, did every other expert

with experience in City government. (JA424, 444-445, 463, 510-511.) This consensus establishes that were the Board based solely on population of the boroughs, the presidents of Staten Island and the Bronx (and, to a lesser extent, Manhattan) would not be able to affect the outcome of decisions the Board makes; the presidents of Brooklyn and Queens could determine every decision.[5]

The State of New York was entitled reasonably to conclude that citizens of smaller boroughs should receive a meaningful voice in the Board's deliberations and that equal votes for all borough presidents, combined with majority rule, was necessary to have those voices heard. (JA420-425.) A decision to place a landfill on Staten Island may facilitate sanitation in Brooklyn, just as a decision to shelter the homeless in the Bronx may relieve Queens of the need to do so. Yet the residents of those larger communities should enjoy no privilege to shift their obligations to distant places—and certainly not without the opportunity of the residents who will be bearing the impact of those obligations to participate meaningfully in the decision to accept them. Fair and effective representation presupposes that a representative will have some ability to affect decisions. It is within the reasonable discretion of New York to decide that an equal vote on the Board is essential to obtain such representation.

Brown v. *Thomson*, 462 U.S. 835 (1983), so confirms. There, Wyoming apportioned one of the seats in its state legislature to

5 Appellees apparently now agree. While arguing in the courts below that the Board's current system is invalid precisely because an alternative weighted voting system exists, they have elsewhere suggested that adoption of any such readjusted weighted voting system would violate the Voting Rights Act of 1965, §§ 2 and 5, 42 U.S.C. §§ 1973 and 1973c. *See* Purnick, *Board of Estimate in Conflict: The Final Phases*, N.Y. Times, Feb. 21, 1988, at 34, col. 1. Their theory is that such a readjustment would substantially dilute the voting power of the presidents of the two boroughs (Manhattan and the Bronx) that have historically elected members of minority groups to the Board. The current Manhattan Borough President is black; the current Bronx Borough President is Hispanic. Their constituency is broader than the geographic units they represent.

a county the population of which was (as Staten Island's is) less than half the population of a perfectly apportioned district. The county had had its own representative in the legislature since 1913 (or twelve years *after* Staten Island first placed a borough president on the Board of Estimate). Counties also had historically served as units of local government (in much the way boroughs served in New York). The State decided that providing the county with a legislative seat was the only way to assure the people of that county a meaningful representative. In upholding the State's decision, the Court instructed that, in weighing the avowed interests purporting to justify a government plan, "substantial deference is to be accorded the political decisions of the people of a State acting through their elected representatives." 462 U.S. at 847-48. New York merits that deference here.

3. *Balancing the Disparate Impact of Local Decisions*: The State has a rational interest in giving its citizens a say in the use of government powers that affect them closest to home. The State was entitled to consider the disparate impact of the Board's highly local powers in designing the Board.

The State of New York could reasonably conclude that the Board's powers affect people in uneven ways precisely owing to their residence in a particular borough. (JA142-143, 428, 446.) The Board's exclusive powers over land use, City property (once borough property), municipal service contracts, and franchises are the most local of all police powers. The people of the less populous boroughs—particularly the Bronx and Staten Island, each with large tracts of undeveloped and a disproportionate inventory of City land—have a compelling interest in having an equal say in the exercise of those powers. The borough boundaries thus have meaning that extend well beyond the convenience of using lines that are already there. Respecting the borough boundaries is of vital importance in preserving some voting power over government action that affects people in special ways because of where those people live. (JA421-425.)

So the State could reasonably conclude. The State placed the Staten Island Borough President on the Board of Estimate not

because Staten Island is a convenient way to form a district but because, among other reasons, the land and people of Staten Island are controlled by a central authority whose decisions about that land peculiarly affect them (JA446, 511-518). It may be that a State is not free to recognize residence as a distinctive voter interest in drawing lines for a government exercising general powers. But when a governing body possesses limited powers that vitally and directly affect the use of land and property, some careful and limited consideration of residence in the composition of that body is not irrational, especially when the State tempers its consideration with assurance of control by an unclassified majority of voters. *Cf. Town of Lockport* v. *Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 266 (1977) (rational for a state to consider whether government action has "a disproportionate impact on an identifiable group of voters"); *see also Salyer Land Co.* v. *Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973) (precisely narrow functions of a governing body may remove it from the reach of "one person, one vote").

4. *Assuring an Effective and Consensual Discharge of Government Powers*: The State has an obvious interest in fostering consensus in local decisionmaking and may reasonably consider the best means to achieve that end. Here, the Board's success has its claims to validity, and the courts below so held: The district court expressly found, and the court of appeals did not dispute, that the Board of Estimate has been an effective and efficient governmental institution in New York City well suited to its limited purpose. (JS87-90.) This finding cannot be divorced from the three policies that are key ingredients of the Board's proficiency.

The first is a policy on the size of the institution to handle the Board's specific duties. (JA74, 418.) Land-use decisions, government contracting, and the other of the Board's administrative duties are unsuitable subjects for large assemblies to consider. No governing body in New York State (or, to our knowledge, elsewhere) boasts a legislature-size membership entrusted with such decisions. A body of any greater size than the current Board would diminish if not eliminate the Board's abil-

ity to form consensus, make deliberative judgments, and act decisively—and usually unanimously (JA94.) According to appellees' principal expert, "[t]his organic need for a small, elected body responsible for setting policy on matters relating to the city and its people has always been reflected in past charter revisions" (JA163), with the result that the Board's size has not changed since 1901.

The second policy relates to the membership of the governing body. (JA417-424.) Throughout the State, and throughout the history of New York City, land-use, government property, government contracting, and budget formation have been assigned to the highest elected officials of a community. The Board's composition reflects a judgment to limit its membership to persons who are elected to office in their own right as executives of existing political units (the City and its boroughs). That each member—borough presidents as well as City-wide officials—performs duties wholly apart from Board membership is an important element in the Board's central role of balancing regional concerns with local needs. Thus, as appellees' expert put it, "[t]he members of the Board, each publicly elected, each with a broad and diversified constituency, and each in an executive position, when met and joined, represent a far greater consensus than any other executive body." (JA74.) He concluded: "Bringing the attributes of chief executive of his borough to the deliberations of the Board is a vital balancing force." (JA166; *see also* JA69, 416-418.)

The third policy concerns the voting strength each member of the Board holds. (JA394, 418-425.) The allocation of equal votes for each borough president bestows proper recognition on elected leaders of politically equal subdivisions, which fosters collegiality and facilitates the ability and willingness of its members to work together to achieve consensus. (JA69, 458-468.) Equality in voting strength among borough presidents not only assures the expression of local interests on matters of peculiar local concern, but also encourages the borough presidents to understand and care about City-wide problems so as to be able to articulate them within their own boroughs. (JA106, 109, 114, 139, 163, 448-449, 461, 510-511.) This equality also promotes

the deference that the Board traditionally pays to the views of borough presidents on matters affecting their boroughs in particular ways. (JA462.) The wonderful mathematics of the Board, given this tradition, gives the local interests five votes on issues in which the tradition is observed, so that local interests have some chance to prevail if one of the City-wide members does not believe that City-wide interests justify overriding the local view. Equal votes among Borough Presidents make them natural allies against the City-wide majority. Unequal votes would fragment the local perspective. The unanimity of Board action over time (JA94)—in a system in which no action is possible absent support of members representing a majority of the City population—powerfully signals the efficacy of this system.[6]

5. *Preservation of Existing Boundaries*: This Court has frequently noted that the preservation of existing boundaries—historic, geographic, and political—is a legitimate consideration in the makeup of governing bodies. *Brown* v. *Thomson*, *supra*, 462 U.S. at 847; *Mahan* v. *Howell*, 410 U.S. 315, 321-22 (1973); *Davis* v. *Mann*, 377 U.S. 678, 686-87 & n.2 (1964); *Reynolds* v. *Sims*, 377 U.S. 533, 580-81 (1964). This is all the more appropriate here, where the Board exercises the most localized authority over these areas. The courts below recognized such interests as legitimate, but failed fully to appreciate the special role of the borough in New York City government.

That New York's borough boundaries are established geographic, historic and political institutions is beyond question. No legislature decided the basic lines those boroughs follow;

6 It is no answer to argue that, prior to 1958, Queens, Staten Island and the Bronx had only one vote, while the other two boroughs had two. The structure of borough government as well as the Board's powers have undergone substantial changes since the State equalized the voting strength of the borough presidents. No one suggests a return to the pre-1958 formula, which would be subject to the same challenge as the present formula. And, whatever the pre-1958 arrangements, they were superseded almost thirty years ago by borough president equality, which has itself strengthened the tradition of borough president deference. Apportionment according to population would destroy it.

nature selected the boroughs as discrete communities, and history abided the selection. That the boroughs continued to perform basic governmental functions for decades after consolidation of the City solidified their position as the principal sub-City units of governance. The State was well within its discretion to decide that use of these established mechanisms as representative components would facilitate the Board's operation and provide the needed check on central authority.

The important integration of neighborhood, borough and City governmental activities which use of the boroughs achieves brings the City together. The borough presence on the Board of Estimate provides a ready conduit of information from the communities and boroughs to the City. (JA166.) Borough representation on the Board enables local leaders to bring an intimate knowledge of City-wide problems and policies to bear on local problems. (JA106, 109, 166-167, 448.) That the numerous studies of City government in the past eighty-seven years have left the borough representation untouched is a testament not only to the constancy with which the boroughs have earned respect as political units but also to their integral role in keeping the wheels of government running. (JA 409-414.) *See Abate* v. *Mundt*, 403 U.S. 182, 186 (1971) (Rockland County's "long history of, and perceived need for, close cooperation" fostered "extensive functional interrelationships").

6. *The Absence of Invidious Purpose or Effect*: No consideration so permeates this Court's decisions as does its concern that an apportionment be "free from any taint of arbitrariness or discrimination." *Roman* v. *Sincock*, 377 U.S. 695, 710 (1964). This Court has repeatedly "underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests." *Abate* v. *Mundt*, *supra*, 403 U.S. at 185-86. The first and most obvious question about any putative justification for an electoral design is whether the intent or effect of the design was to injure a particular segment of the population.

No finding of invidious purpose or effect prompted the courts to invalidate the Board. No party claimed that arbitrary

whim, or racial mischief, or gerrymander explained the Board's design. No facts suggested that a desire to favor or disfavor a class of voters animated the Board's composition or voting system. Nobody asserted that the Board's structure favors the urban over suburban, or hurts any racial or ethnic group. Nothing in the record hints that minority groups are underrepresented or that the Board's design is meant to further some economic or political interests over others. No evidence appeared that the Board was unresponsive to popular will or the hostage of a narrow minority of the City's populace. No one disputed (indeed the trial court found) that wholly neutral, long-standing and substantial public policies informed the Board's structure. To the contrary, plaintiffs explicitly disclaimed any injury other than the allegedly disproportionate voting power, based solely on arithmetic, which the residents of the Bronx and Staten Island are said to enjoy over them. (JS128.)

That injury is in plaintiffs' eyes only. If the consequences of arithmetical discrepancies in borough population denied plaintiffs equal protection of the law, it would not be unreasonable to expect that imbalance to show itself somewhere in the eighty-seven year history of the Board's actions. Yet nothing in the record (or out) remotely supports a claim that the residents of Staten Island or the Bronx enjoy a disproportionate share of the power and resources of New York. (JA506, 509-511.) To the contrary, the smaller boroughs have traditionally been the least potent on the Board; the smallest, Staten Island, is, for example, the repository of the largest garbage dump on the east coast, one soon to acquire the dubious distinction of being "the highest point [of land] along the Atlantic Seaboard." (Verhovek, *Sailing 18,000 Tons of Trash a Day Across the Bay*, N.Y. Times, Dec. 6, 1986, at 31, col. 1. *See also* JA482, 515-516.) To suggest that the residents of this borough (or of the Bronx) enjoy a disproportionate share of the power and resources in New York is to disregard reality.

The absence of any invidious purpose or effect in the Board's design, coupled with the weighty policies that design promotes, establishes that the Board's structure embodies a rational plan

that may reasonably be said to promote legitimate State interests.

That being said, it is hard to understand how the mathematical system used to measure the constituencies of the Board members could possibly become determinative of its constitutionality. Whether one chooses the "disparity" of Ponterio's 16% (JA348) or Banzhaf's 31% (JS42) or *Abate*'s 133% (JS36) or Appellee's original formula of 153% (JA35)—all the products of "reasonable" methods of measurement—the Board remains what it is, does what it does and serves the governmental purposes it serves. The constitutional justification for the Board does not change because one system of reasonable measurement finds a 16% deviation and another 133%. The numbers here are even less compelling because of the difficulty of measuring—with confidence—this three dimensional body, which is unlike any body ever measured by any of the conventional tests.

In applying the equal protection clause to substate regional entities such as the Board, valid non-discriminatory governmental values and policies should take precedence over arithmetic. It is after all reason, not mathematics, that lies at the heart of the equal protection clause.

Conclusion

The Board of Estimate's richly-textured history demonstrates that its composition and voting system enabled the City to recognize the interdependence of activities within its vast region, to temper the most local decisions with regional concerns, and to effect an efficient allocation of resources for the common good. The Board's structure, free of arbitrary or invidious motive, assures majority rule through a unique balance carefully tailored to the peculiar needs of New York City. The Board's makeup injures no one; it instead allows for cooperative action to govern a diverse metropolitan area. The courts below erred in ruling that the Constitution forbids such entities.

"Rather than cause turmoil and foment dissension in a City that has been consolidated for nearly a century, and rather than promoting divisiveness among its five borough members," New York's Mayor Koch concluded his affidavit below, "I respectfully request that the Court treat the Board as it would a still ticking, old and treasured timepiece, and leave its inner workings undisturbed." (JA506-507.)

In other words, in more blunt New York fashion: If it ain't broke, don't fix it.

The judgment below should be reversed and the case remanded with instructions to enter a judgment declaring sections 61 and 62 of the New York City Charter to be valid.

Dated: June 13, 1988

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON
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